



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 29, 1993

Mr. Hector Uribe  
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P.O. Box 5267  
Brownsville, Texas 78520

OR93-383

Dear Mr. Uribe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), article 6252-17a, V.T.C.S. Your request was assigned ID# 20230.

The Brownsville Independent School District (the "school district") received a request for information concerning personnel records of a particular employee. Specifically the request is for the "personnel file of Porter High School teacher Barbara Hirsch." You contend that the requested information is excepted from disclosure by sections 3(a)(2) and 3(a)(11) of the act. You have submitted for our review several documents, including her complete personnel file and records of an investigation conducted on behalf of the school district regarding Ms. Hirsch. The documents in the investigative file may be classified into several categories: 1) correspondence between school officials and Ms. Hirsch concerning allegations of misconduct; 2) a witness statement by the student alleging the misconduct, and several letters to the school board from students and former students; 3) correspondence between attorneys representing the school district and Ms. Hirsch; and 4) file memoranda regarding procedural aspects of the investigation and the file report by the attorney conducting the investigation.

You seek to withhold the investigatory records under section 3(a)(11). However, you raised section 3(a)(11) after the ten day deadline established by section 7(a) of the act. A governmental body may not raise additional exceptions after the ten day period, unless it has compelling reasons to do so. Open Records Decision No. 515 (1988). Since you have not demonstrated compelling reasons, we will not address your argument that section 3(a)(11) excepts the investigative file from disclosure.

Our office is not authorized to raise exceptions not raised by a governmental body, except for section 3(a)(1). Open Records Decision No. 481 (1987); Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C.A. Section 1232g, is implicated here because FERPA provides for confidentiality

of educational records containing personally identifiable information about students, and for release of such records only in accordance with its provisions. See V.T.C.S. art. 6252-17a, §§ 3(a)(14), 14(e); Attorney General Opinion MW-565 (1982); Open Records Decision No. 470 (1987); *see also* Open Records Decision Nos. 332, 327 (1982) (raising sections 3(a)(14) and 14(e)).

Section 3(a)(14) excepts "student records at educational institutions funded wholly, or in part, by state revenue." Section 14(e), which incorporates FERPA into the Open Records Act and makes FERPA prevail over other inconsistent provisions of the act provides:

Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act of 1974, as enacted by Section 513 of Public Law 93-380, codified as Title 20 U.S.C.A. Section 1232g, as amended.

*see also* Open Records Decision No. 431 (1985). FERPA provides in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information . . . ) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. § 1232g(b)(1). "Education records" are defined in FERPA as records that:

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

*Id.* § 1232g(a)(4)(A). The school district must delete information to the extent that it personally identifies a particular student or one or both parents of such a student. Open Records Decision No. 332 (1982) at 3. Thus, only information identifying or tending to identify students or their parents must be withheld from required public disclosure, unless

you receive written authorization from the students if they are over the age of 18, or their legal guardians to release the information. *See* 20 U.S.C. § 1232g(b)(1). We note that several of the letters from students and former students contain information which would tend to identify other students as well the student author of such letters. We have marked those letters that must be withheld in their entirety in order to avoid identification of those students. *See* Open Records Decision No. 294 (1981) (Information may be withheld when it applies to relatively small number of students). In addition, we have marked the portions of the remaining documents that must be withheld under section 3(a)(14) and 14(e) unless the school district has written authorization to release such information.

You seek to withhold the requested information under section 3(a)(2). Section 3(a)(2) excepts from disclosure

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and transcripts of professional public school employees; provided, however, that nothing in this section shall be construed to exempt from disclosure the degree obtained and the curriculum on such transcripts of professional public school employees, and further provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

Section 3(a)(2) excepts information in personnel files only if it meets the test under section 3(a)(1) for invasion of privacy. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information may be withheld if

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

*Industrial Found. of the S. v. Texas Indus. Accident Bd*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information relating to the job performance of teachers is of legitimate public concern. Open Records Decision Nos. 470 at 5; 441 (1986) at 3 (legitimate public concern to know identities of teachers who did not pass TECAT exam). We think that the information in Ms. Hirsch's personnel file does not meet the test for invasion of privacy. However, the grades she received in college, included in the copies of her transcripts within her personnel file, may be withheld under

section 3(a)(2). We have marked those parts of the documents accordingly. The remainder of her personnel file must be released.

We next address the contents of the investigatory files you submitted for our review. Under sections 3(a)(1) and 3(a)(2), although information relating to a disciplinary action against a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the reasons why such actions were taken. Open Records Decision No. 444 (1986). In Open Records Decision No. 579 (1990), this office held that the common law privacy aspects of sections 3(a)(1) and 3(a)(2) did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. -- El Paso 1992, writ denied), addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness and victim statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the nature of the information, i.e. names of witnesses and detailed affidavits regarding allegations of sexual harassment, was exactly the kind specifically excluded from disclosure under the privacy exception as described in *Industrial Foundation*. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation, and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released."<sup>1</sup> *Id.* We think the holding in *Ellen* is controlling on the documents at issue in your request. The identity of the student and all his statements detailing the alleged misconduct are excepted from disclosure by the common law invasion of privacy doctrine as applied in *Ellen*.<sup>2</sup> However, all other records of the investigation not specifically excepted from disclosure by the FERPA provisions must be released with the witness' name redacted, as these documents contain sufficient information to serve the public interest in the investigation, without invading the common law privacy rights of the student who raised the allegations of misconduct.

We have marked the portions of the documents specifically excepted from disclosure under the common law invasion of privacy doctrine incorporated into sections 3(a)(1) and 3(a)(2) of the act which tend to identify the student or his statements. In

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<sup>1</sup>Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of this somewhat embarrassing information greatly outweighs the accused's privacy interest. See *Ellen* at 525.

<sup>2</sup>We note that the student's identity is also subject to the FERPA provisions as discussed above.

addition, we have marked those documents that contain information subject to FERPA which must be withheld as discussed above.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Opinion Committee

LRD/JET/jmn

Ref.: ID# 20230  
ID# 20305  
ID# 20666

Enclosures: marked documents

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